Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 92-266
	)	
Leased Commercial Access	)	CS Docket No. 96-60

COMMENTS OF VIACOM INC.

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COMMENTS OF VIACOM INC.

Viacom Inc. ("Viacom") hereby submits its comments in response to the Commission's Further Notice of Proposed Rulemaking (the "FNPRM") regarding the implementation of the commercial leased access provisions of the Cable Television Consumer Protection and Competition Act of 1992.[1] Viacom's comments principally focus on the effect on programmers of any change in policy regarding the rates that a cable operator may charge programmers seeking to lease capacity on a cable system pursuant to Section 612 of the Communications Act.[2]

I. Summary

As a provider of both advertiser-supported and premium program services to cable operators and other multi-channel video programming distributors ("MVPDs"), Viacom's primary interest in this proceeding is to assess its effect on the programming marketplace. The Act's leased access provisions have the laudable goal of helping

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[1] In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Leased Commercial Access, MM Docket No. 92-266 and CS Docket No. 96-60, FCC 96-122 (rel. Mar. 29, 1996).

[2] Communications Act of 1934, as amended (the "Act"), § 612, 47 U.S.C. § 532.

unaffiliated programmers to obtain access to vital distribution outlets.[3] Based upon a review of the FNPRM, however, Viacom is profoundly concerned that the Commission's proposals could have the effect of changing the fundamental economic model upon which the programming marketplace has developed over the years. This change would result if a cable operator subject to channel capacity constraints were forced to bump an existing program service to make room for a leased access programmer. In order to maintain its distribution and the integrity of its subscriber base, the bumped programmer would be forced to apply to the cable operator for continued distribution as a leased access programmer, and, even if that programmer were lucky enough to obtain the leased access channel, it would then have to pay the cable operator for distribution when, just a short while before, the cable operator was paying a license fee to the programmer. As a result, the entire economic model, revenue assumptions and financial underpinnings of the programmer would have been eroded and turned inside-out. Viacom believes that such a result would have a devastating effect on existing premium and advertiser-supported program services.

Significantly, however, the record demonstrates that no pricing reformulation is needed to meet the intent and purpose of Section 612. A diverse programming marketplace already exists and there appears to be no reason for imposing a radical pricing restructuring in order to achieve the goal of increasing diversity in programming. Indeed, there is a distinct possibility that the result of the proposed changes will be to place the programmer at a greater disadvantage in dealing with cable

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[3] See FNPRM at ¶ 2.

operators during contract negotiations without providing any net increase in diversity -- a result totally at odds with the goals of the leased access provision.

Accordingly, Viacom respectfully submits that the Commission should: (i) not adopt the plan proposed in the FNPRM or any other plan that would put existing programmers at risk; (ii) protect existing programmers by confirming that cable operators may not abrogate existing contracts in order to meet their leased access obligations; and (iii) if changes are to be made, allow for a transition period sufficient to mitigate the potential harms to programmers that may result from any changes in the demand for leased access capacity. In addition, Viacom urges the Commission to adopt a first-come, first-served policy with respect to the allocation of leased access channel capacity, and refrain from implementing any allocation system based on market rates or an auction-like structure.

II. The Proposed Leased Access Rate Formula Could Lead to Fundamental Changes in the Economic Model Upon Which Program Services Currently Operate

Viacom believes that the FNPRM's proposed formula for determining the maximum leased access rates that may be charged to programmers will result in rates that are nominal -- even approaching zero in certain cases. Such a result would obviously make it significantly more desirable for certain programmers to gain access to cable systems via leased access. Given that cable systems have little or no excess capacity with which to accommodate additional program services, however, Viacom is concerned that the result of nominal rates -- and an accompanying increase in the use of leased access capacity -- could well be to alter fundamentally the economic model upon which established programming services have based their operations, to the severe detriment of existing program services.

For example, the majority of advertiser-supported program services have based their business models on the dual revenue streams that flow from advertising revenue and license fees paid by distributors. An advertiser-supported program service "bumped" from a cable system in order to make room for a leased access programmer not only will lose license fees from the cable operator, but would likely suffer a significant loss in advertising revenue as viewership declines. Incredibly, the "bumped" programmer would then need to apply to the cable operator to lease access in order to maintain its existing level of distribution and advertising revenues. Thus, the programmer would be faced with the Hobson's Choice of losing access and thus suffering a decrease in both license fees and advertising revenue or, assuming it is able to obtain carriage via leased access, paying cable operators -- while still losing license fees -- in order to maintain its current level of distribution which helps produce the revenues necessary to fund the production or purchase of high-quality programming. In either case, the financial structure of the programmer is severely undermined and the available capital necessary to spend on quality and innovative programming is significantly reduced.

By the same token, premium program services which do not have advertising revenues rely only on license fees from affiliates. These premium services have entered into long-term programming commitments with movie studios and others on the basis of the revenues they expect to receive under existing affiliation agreements.

Again, disruption of existing carriage will adversely affect the revenues obtained by the programmer. Yet the programmer must continue to meet its programming and other commitments entered into on the basis of achieving a level of carriage -- and revenues -- it had every legitimate expectation would be met. Further, because premium services are offered á la carte, not as part of a basic or expanded basic package, a premium programmer seeking to retain current levels of distribution through leased access would need to create the necessary infrastructure for, and to conduct, at significant expense on a system-by-system basis, marketing, billing and collection, and subscriber connects and disconnects -- unanticipated expenses for which it did not plan when entering into its long-term commitments.

It is apparent, therefore, that carriage disruptions -- whether of an advertiser-supported or premium service -- would throw into disarray financial projections and potentially threaten the viability of the program service. At best, even if the programmer is able to maintain distribution, it will have less revenue to devote to programming and marketing, thus restricting its ability to compete with other program services that are able to maintain their existing revenue stream.

Moreover, even the potential of displacement could force programmers -- particularly unaffiliated programmers that are the intended beneficiaries of the leased access requirements -- to make even greater accommodations to cable operators in order to maintain existing carriage and to obtain launches of new program service offerings. This is so because, as long as there is a threat that a particular program service may be removed in order to accommodate a leased access programmer, the programmer will be at a greater disadvantage in dealing with the cable operator during contract negotiations and may be forced to make concessions in order to retain carriage on the system.

Because of the economic dislocations to some programmers that could result from their having to vacate channel space in order to accommodate other programmers who wish to use leased access as a means of gaining distribution, the Commission must, before reformulating its leased access policies, first determine that the rules it earlier adopted are in fact in need of change. Indeed, in 1992, the Commission determined that it had met its statutory obligations when it adopted the current rules. Except for the fact that more programming diversity exists today than four years ago, nothing has changed since those rules were adopted.[4] Because existing programmers could be put at serious risk as a result of revised leased access policies, it is therefore critical that the Commission substantiate whether or not a reformulation is needed at all.

If, after this evaluation, the Commission nevertheless determines to make a change, it is then essential for the Commission at the same time to affirm that cable operators may not abrogate existing contracts with programmers in order to meet cable operators' leased access requirements. Failure to do so would result not only in the economic changes described above, but would cause widespread disruptions to established viewing patterns as popular program services are bumped in order to make

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[4] See, e.g., In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, CS Docket No. 95-61, FCC 95-491, at ¶ 150 (rel. Dec. 11, 1995) (hereinafter, the "1995 Competition Report").

room for leased access programming. Such a result is not only harmful to programmers, but is not in the consumer's interest of maintaining access to popular program services.

In sum, the Commission's proposals present a significant possibility of fundamentally changing the economics of the programming marketplace to the detriment of programmers and consumers. Accordingly, Viacom submits that the existing rules should not be replaced or modified.

III. There is no Current Need to Subsidize Leased Access Programmers in Order to Achieve the Goal of Diversity Underlying the Leased Access Rules

As noted in the FNPRM, there has been much debate over the reasons why leased access has not been used by more programmers to gain carriage on cable systems.[5] Whatever the reason, Viacom submits that, in deciding whether or not to alter the existing rate formula, the Commission should bear in mind that (i) the prime policy goal of the leased access provisions is to ensure that the public has access to a diversity of program sources;[6] and (ii) the leased access provisions are just one of several measures designed to enhance diversity. Among other things, Congress mandated the imposition of limits on the amount of capacity that a cable operator may devote to program services in which it holds an attributable interest[7] as well as the

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[5] See FNPRM at ¶ 26. Cable operators and programmers argue that leased access is, for the most part, not an economically viable way for most programmers to do business. Certain leased access programmers and some public interest groups, however, claim that leased access is not economically viable because cable operators have set their rates unreasonably high.

[6] 47 U.S.C. § 532(a).

[7] 47 U.S.C. § 533(f)(1)(B).

regulation of carriage agreements in order to restrain the perceived leverage of cable operators in their negotiations with unaffiliated programmers.[8] Thus, before taking drastic action that may result in a change in the economic viability of existing programmers as a result of a regulatory-inspired increase in the usage of leased access channel capacity, the Commission should look not at the level of use of leased access capacity, but should assess the level of diversity in the programming marketplace.

Viacom submits that such an assessment will reveal a diverse programming marketplace -- diversity that should only expand as cable system capacity increases in the future with the advent of digital technology and as competition develops among various MVPDs. Indeed, as the Commission notes in its 1995 report on the state of competition in the video distribution marketplace, the number of program services available has nearly doubled since 1990 and nearly half of those services are unaffiliated with any cable operator.[9] Viacom thus believes that, given the lack of available capacity for new programming, it would be a mistake for the Commission to make significant changes to its leased access rules at this time. Because increased usage of leased access at a time of channel capacity shortages is likely to result in the replacement of one unaffiliated program service with another, any such change will merely cause undue economic hardship to existing programmers without any increase in diversity. If the Commission nevertheless determines that some change is necessary, Viacom submits that it should be implemented only at such time as digital compression

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[8] 47 U.S.C. § 536.

[9] 1995 Competition Report, supra at ¶ 150.

is widely deployed so that there will be no reason to bump existing third-party programmers.

IV. No Matter What Formula the Commission Ultimately Implements, a Reasonable Transition Period is Needed in Order to Minimize any Negative Effects on Existing Programmers and the Public

As described above, existing programmers have based their business plans on the current economic environment. Advertiser-supported and premium services alike have made program commitments and devised marketing plans and incurred other expenses based on assured levels of distribution. Further, advertiser-supported services have made commitments to advertisers based on such levels of distribution. To suddenly change these economic projections would, as described above, cause severe hardships for existing programmers.

Viacom therefore agrees with the Commission that a transition period is needed in order to phase in any increased demand for leased access.[10] Such a transition period will provide cable operators time to increase the capacity of their systems -- thus reducing the risk that existing programmers without contractual rights to continued carriage will be bumped in order to accommodate leased access providers -- and, if necessary, will provide programmers with time to adapt their business plans in order to survive in a world with a new economic model for programmers.

Viacom believes, however, that the transition period proposed by the Commission is too limited to mitigate the harms to programmers and consumers that the Commission hopes to avoid. Accordingly, Viacom submits that additional

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[10] See FNPRM at ¶¶ 98-99.

measures are needed. First, as discussed above, the Commission should not require cable operators to displace any existing program service in order to accommodate requests for leased access. Such an approach would be consistent with the approach adopted by Congress in 1984 when enacting the original leased access provision.[11] Second, the Commission should confirm that cable operators have no right to abrogate existing contracts with programmers in order to accommodate requests for leased access capacity. Allowing -- or even condoning -- the abrogation of existing contracts would not only result in the financial disruptions described above, but would place programmers at a greater disadvantage in dealing with cable operators during contract negotiations because of the need to make accomodations to maintain existing carriage. Finally, because program agreements continually come up for renewals or extensions, the Commission should (i) provide for a transition period of sufficient length so that the short-term imperative of renewing contracts does not cause dislocations to programmers' longer-term economic models and financial requirements; and (ii) phase in any new rate structure so that, to the extent program services are displaced in order to accommodate requests for leased access, the disruptions will be minimized. A lengthened transition period to allow for the wide-scale deployment of digital compression technology would provide existing programmers and consumers the insulation from disruptions that would otherwise occur.

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[11] See 47 U.S.C. § 532(b)(1)(E) ("An operator of any cable system in operation on the date of enactment of this title shall not be required to remove any service actually being provided on July 1, 1984, in order to comply with this section . . . .").

V. Leased Access Programmers Should Not Have a Guaranteed Right of Access to Any Tier of Service Offered by Cable Operators to Their Subscribers

Unlike its treatment of must-carry and PEG channels, Congress did not mandate any particular tier placement for leased access programmers. In the FNPRM, however, the Commission for the first time tentatively concludes that leased access programmers should be provided with access to the basic or expanded basic tiers of a cable system.[12] Viacom urges the Commission to reconsider this tentative conclusion. Guaranteed placement on a tier will exacerbate the problems described above, encroach on the editorial discretion of cable operators, and effectively provide leased access programmers with a subsidy through the well recognized value of tier placement and the proposed rate formula.

As currently structured, a leased access programmer placed on a tier would pay the cable operator the "maximum permitted rate" minus the amount of subscriber revenues the operator is deemed to obtain from that channel. At least in part, it is this "payment" derived from subscribers rather than the leased access programmer that results in the nominal rates that would be paid for leased access under the proposed formula. Unfortunately, by arbitrarily assuming that each channel on a tier is of equal value to consumers and programmers, the proposed formula fails to account properly for the value to tier placement that the cable operator and existing programmers have created by the careful selection and packaging of programming and the development and marketing of those services. By failing to recoup this value directly from the

[12] FNPRM at ¶¶ 118-120.

programmer, the proposed formula effectively provides a subsidy to the leased access programmer.

Additionally, mandatory tier carriage would encroach on the editorial discretion of the cable operator and hinder its ability to package programming. Although the purpose of the leased access provisions was to limit cable operator editorial discretion over certain channels on its system, there was no intent to impinge further upon the operator's editorial discretion over the channels remaining under its control.

Viacom therefore submits that the Commission should maintain its existing policy and should not mandate tier placement of leased access programmers. This approach is driven by at least two imperatives. First, by removing the need to impute revenue to the cable operator for carriage of the leased access programming, it mitigates the possibility that the leased access programmer will obtain a windfall subsidy. Second, rather than involving the Commission or the cable operator in the valuation of leased access programming, it places the valuation of the programming where it belongs -- between the programmer and the consumer.[13] Accordingly, Viacom submits that the Commission should not require cable operators to place leased access programmers on any particular tier of service.[14]

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[13] Thus, a leased access programmer that wants to guarantee that its program service was delivered to all subscribers need only inform the cable operator that it does not desire to charge a fee for its programming. Alternatively, such a leased access programmer might desire to recoup some of its costs in the form of subscriber fees and would make its programming available only to those subscribers willing to pay the fee determined by the programmer as appropriate.

[14] Of course, the Commission's rules should allow leased access programmers to negotiate for and obtain tier placement from the cable operator if it so desires.

VI. The Commission Should Adhere to its Tentative Conclusion to Allocate Leased Access Channel Capacity on a First-Come, First-Served Basis

Viacom agrees with the Commission's tentative conclusion that leased access channels should be allocated on a first-come, first-served basis.[15] This is a reasonable approach that precludes carriage decisions being based on factors that should not be considered, such as the content of the program service or the identity of the programmer seeking access. In no event, however, should the Commission implement a regime that results in the auctioning of leased access capacity to the highest bidder, which would merely compound the economic pressures on programmers for the reasons described above. With regard to part-time carriage, Viacom submits that the Commission should maintain its existing policy and not force cable operators to open up a new leased access channel if a request for part-time carriage could be reasonably accomodated by carriage on an existing leased access channel.

VII. Conclusion

In sum, Viacom believes that the FNPRM's proposals for commercial leased access have the potential to alter fundamentally the economics of the programming business. Such a drastic result was not only not intended by either Congress or, it appears, the Commission, but an analysis of diversity in the programming marketplace reveals that it is not necessary.

Accordingly, Viacom respectfully submits that the Commission should (i) not adopt the plan proposed in the FNPRM or any other plan that would put existing

[15] FNPRM at ¶ 128.

programmers at risk; (ii) protect existing programmers by confirming that cable operators may not abrogate existing agreements with programmers in order to meet cable operators' leased access obligations; (iii) if changes to existing leased access rules are to be made, allow for a transition period sufficient to mitigate the potential harms to programmers that may result; (iv) reverse its tentative conclusion to provide leased access programmers with guaranteed tier placement; (v) adhere to its tentative conclusion to allocate leased access channel capacity on a first-come, first-served basis; and (vi) avoid the auctioning of leased access capacity to the highest bidder.

Respectfully submitted,

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